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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 291

MINNESOTA MINING AND MANUFACTURING COMPANY,
Petitioner-Defendant,

vs.

NEW JERSEY WOOD FINISHING COMPANY,
Respondent-Plaintiff.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Certiorari Granted on October 19, 1964

BRIEF FOR RESPONDENT

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Counter-Statement of Questions Presented

1. (a) Does not an FTC proceeding based on violations of section 7 of the Clayton Act, 38 Stat. 731, 15 U.S.C. Sec. 18 suspend the statute of limitations, section 4b of the Clayton Act, 69 Stat. 283, 15 U.S.C. Sec. 15b, applicable to a private litigant's causes of action under section 7 of the Clayton Act and sections 1 and 2 of the Sher-

man Act, 26 Stat. 209, 15 U.S.C. secs. 1 and 2, against the defendant in the FTC proceeding?

(b) Is not such a proceeding as much a "proceeding . . . instituted by the United States" to enforce the antitrust laws for purposes of the tolling statute, section 5(b) of the Clayton Act, 69 Stat. 283, 15 U.S.C. Sec. 16(b), as one instituted by the Department of Justice?

2. Are the *only* proceedings which toll the statute of limitations in antitrust cases under section 5(b) those which give birth to a final judgment or decree which by reason of section 5(a) of the Clayton Act, 69 Stat. 283, 15 U.S.C. sec. 16(a), is *prima facie* evidence against the same defendant in subsequent private antitrust litigation?

(a) Assuming that the answer to the foregoing question is in the affirmative, does not an FTC proceeding under the Clayton Act give rise to a determination which may be used as *prima facie* evidence in a subsequent private suit based on violation of the antitrust laws?

3. Does not a proceeding instituted by the United States under the Clayton Act suspend the statute of limitations applicable to a claim under the Sherman Act, predicated upon the very same facts?

Counter-Statement of the Case

This is a private antitrust suit brought by New Jersey Wood Finishing Company against Minnesota Mining & Manufacturing Company ("3M") and Essex Wire Corp. ("Essex") based on violations of sections 1 and 2 of the Sherman Act and section 7 of the Clayton Act, 26 Stat. 209, as amended, 15 U.S.C. Secs. 1 and 2; 38 Stat. 731, as amended, 15 U.S.C. Sec. 18. Presented for review under Writ of Certiorari is the unanimous opinion of the

United States Court of Appeals for the Third Circuit (R. 69) that because of the pendency of an FTC proceeding against 3M from June 1960 to August 1961 the statute of limitations, Sec. 4b of the Clayton Act, 69 Stat. 283, 15 U.S.C. Sec. 15b, was tolled and plaintiff's complaint timely filed.

By complaint dated June 24, 1960 (R. 14a), the United States of America, through the FTC, charged defendant 3M with a violation of section 7 of the Clayton Act, alleging that recent acquisitions by 3M in the electrical insulation field resulted in "the *actual* or potential lessening of competition" in that industry (R. 15a) (emphasis supplied). The government complaint recited a consistent pattern of past acquisitions by 3M in the industry, and then alleged as one wrongful acquisition 3M's purchase from Essex in August, 1956 of Insulation and Wires, Inc. ("I.W.I."), formerly one of the leading independent distributors of electrical insulation products (R. 20a). The FTC proceeding was terminated on July 19, 1961 by the entry of a consent order, under the terms of which 3M agreed to divest itself of I.W.I. (R. 29a).

Thereafter, on November 20, 1961, respondent filed its complaint in this matter (R. 5a). Subsequently an amended complaint was filed (R. 48a). The amended complaint sets forth three causes of action. It is brought under section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. Sec. 15, for treble damages on account of violations by 3M and Essex of sections 1 and 2 of the Sherman Act, and section 7 of the Clayton Act. The substance of plaintiff's cause of action under the Clayton Act is the acquisition by 3M of I.W.I. The Sherman Act violations are grounded in conspiracy manifested by continuing overt, wrongful acts (R. 51a) commencing with the date of 3M's acquisition of I.W.I. and continuing until the time of the filing of the complaint. Specifically, the acts complained of are:

1. The acquisition of I.W.I. from Essex by 3M;
2. The control of I.W.I. by 3M to prevent the former from distributing plaintiff's products;
3. The control of I.W.I. by 3M to insure that the former purchased certain goods from 3M's subsidiary, Irvington Varnish and Insulator Company, to the exclusion of a similar line of goods manufactured by plaintiff;
4. The control of I.W.I. by 3M to effect tie-in sales of electrical insulation products and other 3M manufactures;
5. The arrangement between the defendants to have Essex deal only with I.W.I. in purchasing electrical insulation products to the exclusion of competitive distributors handling plaintiff's products.

Defendant moved for summary judgment against the plaintiff on the ground that plaintiff's causes of action are barred by the statute of limitations. This motion was denied by the Honorable Anthony T. Augelli, U.S.D.J. (R. 56a) and an appeal was taken to the United States Court of Appeals for the Third Circuit (R. 68a).

In an opinion (R. 69) filed May 20, 1964, Circuit Judge McLaughlin, writing for a unanimous court comprised of himself, Chief Judge Biggs, Jr. and Circuit Judge Hastie, affirmed the opinion of Judge Augelli.

Both courts below held that the FTC proceeding was a "civil proceeding . . . instituted by the United States" within the meaning of section 5(b) of the Clayton Act (R. 63a; 90). Therefore, the statute of limitations was tolled during the time that the proceeding was pending.

The District Court (R. 65a) and the Court of Appeals (R. 92) also agreed that, since there was common identity of fact between the allegations underlying the Clayton Act proceeding by the FTC and plaintiff's Sherman Act allegations, the statute of limitations was tolled with respect to plaintiff's Sherman Act cause of action as well as with respect to plaintiff's claim based on a violation of section 7 of the Clayton Act.

These eminently correct decisions recognize and further the vital role which private damage suits play in the enforcement of the antitrust laws of the United States, and should be affirmed in all respects.

Summary of Argument

None of plaintiff's causes of action is barred by the statute of limitations of the Clayton Act. Section 5(b) of the Clayton Act operated to toll the statute of limitations during the pendency of the FTC proceeding against the petitioner.

The tolling provision (section 5(b)) is broader than the *prima facie* evidence provision (section 5(a)) and considerations regarding *prima facie* evidence are irrelevant to this litigation. An FTC proceeding under the antitrust laws clearly tolls the statute of limitations. Such a proceeding under the Clayton Act is a "proceeding . . . instituted by the United States" within the meaning of section 5(b).

The 1914 legislative history is not helpful in this analysis. Since that time Congress has expanded the jurisdiction of the FTC. The procedures of the FTC are analogous to those of a court of equity.

Even assuming that section 5(a) in some way defines the meaning of section 5(b), there is no merit, either in con-

stitutional doctrine or public policy to the argument of petitioner that an FTC proceeding under the Clayton Act does not come within section 5(a).

Since the FTC proceeding against petitioner dealt with the same "matters complained of" in the complaint herein, the statute of limitations was tolled with respect to respondent's Sherman Act causes of action as well as with respect to its cause of action based on the Clayton Act.

ARGUMENT

POINT I

Respondent's cause of action against 3M, based on Section 7 of the Clayton Act, is not barred by the Statute of Limitations which was tolled by the Federal Trade Commission proceeding.

Section 4b of the Clayton Act, 69 Stat. 283, 15 U.S.C.A. Sec. 15b provides a four-year statute of limitations on private actions arising out of violations of the antitrust laws. This section is modified by a tolling provision, section 5(b) of the Clayton Act, 69 Stat. 283, 15 U.S.C.A. Sec. 16(b), which reads:

> "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of

limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

Therefore, if the FTC proceeding instituted against 3M (R. 14a) is within the contemplation of the tolling section, plaintiff's Clayton Act cause of action against 3M survives any attack based on the statute of limitations, since it was commenced within one year of the termination of the FTC proceeding, complains only of matters occurring within four years prior to the filing of the FTC complaint, and "is based in whole or in part" on matters complained of in the FTC proceeding.

The tolling statute, section 5(b), *supra*, is immediately preceded by another subsection, section 5(a) of the Clayton Act, 69 Stat. 283; 15 U.S.C. Sec. 16 (a), making final judgments or decrees in anti-trust proceedings brought by or on behalf of the United States *prima facie* evidence in subsequent private suits:

"(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the anti-trust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* That this section shall not apply to consent judgments or decrees entered before

any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title."

3M argues that an FTC proceeding never can toll the statute of limitations despite the fact, as will be spelled out at length below, that the FTC and the Antitrust Division of the Department of Justice have concurrent and overlapping jurisdiction to enforce the antitrust laws. The argument is predicated on an analysis of the language of the statute, its legislative history and the creation of a straw-man in the guise of an alleged constitutional prohibition against the use of FTC proceedings as *prima facie* evidence.

A. The *prima facie* evidence provision (section 5 (a)) and the tolling provision (section 5 (b)) are not co-extensive.

At the outset, it must be clearly understood that respondent in no way concedes that the *prima facie* (section 5 (a)) is involved in this litigation. This matter involves the tolling of the statute of limitations under section 5(b). Judge McLaughlin agreed that there was substantial basis for Judge Augelli's holding that the two sections should be treated as they appear in the statute book—that is, separately (R. 89, 332 Fed. 346, 359). It is true that Judge McLaughlin went on to assume that the 3M premise was correct—namely, that only a proceeding which generates *prima facie* evidence under section 5(a) serves to toll the statute of limitations under section 5(b); but this argument need not be incorporated as part of the Third Circuit's *holding*. As Judge McLaughlin stated:

"We have reached this question solely because there was some evidence in the legislative history of the section that the two subsections are to be construed to-

gether, as other courts have subsequently held. However, the decision of the court below that the two subsections should not be regarded as inter-dependent does have substantial support.

"The above mentioned intention in 1914 does not seem as plain in 1955 when Congress amended Section 5 and divided Section 5 into subsections (a) and (b). Act of July 7, 1955, c. 283, Section 2, 69 Stat. 283. The committee reports on the 1955 amendment to Section 5, plainly intimated a broader reason for tolling the statute of limitations. By 1955, the Supreme Court had pointed to the limited practical value of the prima facie evidence to a private suitor. See Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U. S. 537 (1954); Partmar Corp. v. Paramount Pictures Theatres Corp., 347 U. S. 89, 102-103 (1954). The real importance of government proceedings that accrues today to private suitors is the availability to them of the government's case against the defendant. Section 5(b) enables 'a plaintiff to take advantage of facts uncovered' as a result of the government proceedings. New Jersey Wood Finishing Co. v. Minnesota Mining & Manufacturing Co., 216 F. Supp. 507 at P. 510 (D. C. N. J. 1963). In the Senate Report on the 1955 amendment to Section 5 (b) the Committee wrote:

> 'Although the statute is tolled during the pendency of the proceedings brought by the United States, the plaintiff in a treble-damage action may find himself hard pressed to reap the benefits of the Government suit, if, upon its conclusion, he has but a short time remaining to study the Government's case, estimate his own damages assess the strength and validity of his suit, and prepare and file his

complaint.' Senate Report No. 619, June 21, 1955, U. S. Code Cong. & Ad. News, 84 Cong. 1st Sess. P. 2332.' " (R. 89).

3M argues that the two paragraphs of section 5 must be read together; that is, that a proceeding by the United States to enforce the antitrust laws can never serve to toll the statute of limitations unless that proceeding produces a decree which is admissible as *prima facie* evidence in any subsequent private litigation against the same defendant.*

The statute does not so provide.

In *Union Carbide and Carbon Corp.* v. *Nisley*, 300 F. 2nd 561 (10th Cir. 1962), a private action based on a conspiracy in violation of the Sherman Act, Chief Judge Murrah considered the relationship of the tolling provi-

* As the opinions below both indicate (R. 62a; 86), 3M has heretofore overtly argued that even a proceeding brought by the Justice Department does not toll the statute of limitations whenever such a proceeding is terminated by a consent decree entered before testimony is taken. (See the proviso in Section 5(a)). This is really the logical—and absurd—conclusion of their argument that the only purpose for tolling is to generate usable evidence for a subsequent private suit. Although in their latest brief they have not explicitly stated this argument, it is there, nevertheless, although in subtler form. (See petitioner's brief, bottom of page 60). Petitioner still objects to a private litigant being able to await the outcome of a government antitrust proceeding. This construction would destroy the efficacy of section 5(b), by making it impossible for private litigant to derive the benefits Congress expressly contemplated when it created the tolling provisions. (See p. 15, *infra*). 3M would compel private parties to sue immediately even though the Federal Government, through the Justice Department or the FTC, was proceeding on the same facts for fear that the United States proceeding *might* terminate in a consent judgment after the expiration of the limitations period.

sion and the *prima facie* evidence section. While noting that the two sections are complementary, Judge Murrah, in language reproduced with pregnant omissions at pages 66-67 of petitioner's brief, recognized that the tolling provision, section 5(b), *is* broader than the *prima facie* evidence, section 5(a):

> "But, we do not think they are necessarily co-extensive in their frame of reference. The purpose of the first paragraph of Section 5 was 'to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government in antitrust actions'; and to that end 'to confer, subject only to a defendant's enjoyment of its day in court against a new party, as large and advantage as the estoppel doctrine would afford had the Government brought suit.' *Emich Motors Corp.* v. *General Motors,* 340 U. S. 558, 71 S. Ct. 408, 95 L. Ed. 534.
>
> "The corollary purpose of the tolling provisions of the second paragraph of Section 5 is to vouchsafe the intended benefits of related government proceedings by suspending the running of the statute of limitations until the termination of the government proceedings, and allowing the private suitor one year thereafter in which to prepare and file his suit.[1] The competency of a government judgment in a private suit is necessarily restricted to the requirements of due process. But the tolling of the statute during the pendency of the government litigation is not so limited." 300 F. 2d 569 (Footnote omitted.)

In rebuttal to respondent's argument that the two sections are not co-extensive petitioner cites (at page 58 *et.*

seq. of is brief) four decisions which are clearly distinguishable from the case at bar: *Momand* v. *Universal Film Exchange*, 43 F. Supp. 996 (D. Mass. 1942); *Sun Theatre Corp.* v. *RKO Radio Pictures*, 213 F. 2d 284 (7th Cir. 1959); *Samuel Goldwyn Productions* v. *Fox West Coast Theatres Corp.*, 146 F. Supp. 905 (N. D. Cal. 1956) *rev'd on other grounds* 328 F. 2d 190 (9th Cir. 1964); and *Charles Rubinstein, Inc.* v. *Columbia Pictures Corp.*, 154 F. Supp. 216 (D. Minn. 1957), *aff'd* 289 F. 2d 418 (8th Cir. 1961).

No authority was cited in *Momand* to support Judge Wyzanski's conclusion (quoted at p. 58 of petitioner's brief) as to the relationship of the two paragraphs of the then section 5. Furthermore, the facts before him were radically different from those with which we are concerned here. *Momand* involved many defendants, some of whom had been defendants in earlier antitrust proceedings brought by the United States government. Read in context, Judge Wyzanski's statement refers to the fact that the plaintiffs were asking for a tolling of the statute of limitations (1) against parties not defendants in the earlier government proceedings; or (2) in regard to causes of action involving acts or occurrences not complained of in the prior government proceedings:

> "In none of the pleadings in those proceedings [the prior governmental proceedings] is there any reference to alleged wrongs in Oklahoma [the situs of the acts complained of in *Momand*] or alleged wrongs directed specifically against the assignor of this plaintiff. In at least one case the proceedings are not only remote in place but also in time, having been begun after this suit was begun." 43 F. Supp. 996, 1011.

Judge Wyzanski never considered the case where the very act complained of in the government proceeding was

the act being complained of in a subsequent private litigation, which is the undisputed situation in the case at bar. That Judge Wyzanski, in *Momand,* considered a distinguishable fact situation is clearly pointed out in *Steiner* v. *Twentieth Century-Fox Film Corp.,* 232 F. 2d 190, 196 (9th Cir. 1946). In language immediately preceding that which is quoted at page 72 of the defendant's brief, the *Steiner* court said:

> "Momand v. Universal Film Exchange, D. C. Mass. 1942, 42 F. Supp. 996, at pages 1011, 1013 is a case in point. Judge Wyzanski ruled, in essence, that in order for the statute of limitations to be tolled for private litigants in antitrust conspiracy actions, *the matter complained of must be the same acts that achieve the same conspiracy complained of in the action brought by the United States.* We agree with this conclusion." (Emphasis supplied.)

The respondent, likewise, agrees.

The same thesis, and nothing more relevant to the instant litigation, is the rationale for the other cases cited by petitioner on the point. In *Sun Theatre Corp.* v. *RKO Radio Pictures, Inc., supra,* at page 292, the court stated:

> "We are of the opinion that section 5 operates to toll the running of limitations during pendency of a government antitrust suit *only as to named defendants,* and that in the present case running of the Illinois statute was never tolled as to B & K by pendency of *U. S.* v. *Paramount.*" (Emphasis supplied.)

Sun Theatre Corp. also ruled:

> "The second paragraph of that section is designed to insure to injured parties *the full fruits* of the govern-

ment's case by suspending during the pendency thereof the running of the statute against a right of action in favor of parties injured by the same act." (Emphasis supplied.) page 291.

Similarly both *Samuel Goldwyn Products* v. *Fox West Coast Theatres Corp., supra,* and *Charles Rubinstein, Inc.* v. *Columbia Pictures Corp., supra,* concern attempts by plaintiffs to toll the statute of limitations against parties not involved in the earlier government proceedings. In the *Goldwyn* case the court stated:

> "A comparison of the essence of the complaint in the Paramount case with the essence of the complaint of the plaintiff here discloses two substantially different conspiracies by different sets of conspirators, for quite different objectives, and employing in large part different means." 146 F. Supp. 905, 907.

In the *Rubinstein* case it was stated, in the sentence immediately preceding the quotation presented to the court by the petitioner (petitioner's brief, p. 59):

> "It would be a surprising theory of construction if the tolling of the statute applies to one who is not a party to the government litigation." 154 F. Supp. 216, 218

The case at bar is quite different from the above decisions, for 3M was named in the FTC proceeding and entered into the consent order by which the proceeding was terminated.

Even Butler, *Application & Constitutionality of Tolling of Statute of Limitations Provision of Section 5, Clayton Act, in Cases of Dual Enforcement Jurisdiction,* 8 American Bar Association, Antitrust Section Proceedings 42, 46 (1956), an authority regarded most favorably by petitioner observes:

> "There are several distinctions which may be important between the prima facie evidence provisions and the tolling provisions of Section 5. The government decree may be used in evidence only 'as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto.' The tolling provision, on the other hand, applies to every right of action 'based in whole or in part on any matter complained of' in the government suit. In addition, the statute apparently is suspended from the time the government suit starts, whether or not the government prevails.' "

It is quite clear that there *are* benefits for a private litigant other than the introduction of the decree intended to be derived from a prior government proceeding. Part of the policy of the Clayton Act is the encouragement of private antitrust suits. This policy is clearly announced in Representative Clayton's original report on the bill:

> "This section also provides that the statute of limitations shall be suspended in favor of private litigants who have sustained damage to their property or business by the wrongful acts of the defendant during the pendency of a proceeding instituted by or on behalf of the United States. The entire provision [present sections 5(a) and 5(b)] is intended to help persons of small means who are injured in their property or business by combinations or corporations violating the Antitrust Law." H. R. Rep. 627, 63rd Cong. 2nd Sess. 14 (1941).

In furtherance of this policy, the record produced by an FTC proceeding is obviously of great help in marshalling evidence for a private litigant's case. The record has been of significant assistance to plaintiff in this very matter.

Annexed to the FTC consent order filed against 3M is "Appendix A", which contains valuable factual information regarding 3M's transactions in the electrical insulation industry as late as 1958 (R. 35a to R. 40a).

That evidentiary material is available to private plaintiffs when adduced before the FTC is clear from the rules of the Commission itself:

> "Information in the following classes is public and may be obtained as indicated: . . .
>
> (e) The pleadings, transcript of testimony, exhibits and all documents received in evidence or made a part of the record in adjudicated proceedings (except evidence received in camera);" 16 C. F. R. Section 1.132(e); see generally 16 C. F. R. 1.131 *et seq.*

Finally, it must be pointed out that Professor Handler's statements quoted at page 64 of petitioner's brief are incomplete and out of context. The committee hearings at which he was testifying were held to consider a bill which contained a provision making *conclusive* a final judgment or decree rendered in any civil or criminal proceeding. H. R. 7905, 81st Congress, 2d Sess. The Professor appeared in support of the proposed legislation. The example put to him by Representative Michener concerned an "investigation" by the Justice Department, not a "proceeding", and it is in the context of the disclosure of the results of an investigation that it must be evaluated. Obviously the latter is not contemplated by 5(a), and certainly there can be no tolling under 5(b) as a result of an investigation. But in the same hearing, Handler strongly urged making the judgment or decree *conclusive* on the defendant because:

> ". . . I think that by making the evidence conclusive you would be adding to the pressure [on the defendant to

> enter into a consent decree]. I favor adding to the pressure because I think it is a potent instrument for deterring wrongdoing." p. 24.

Time and again the role of the private litigant is recognized as vital to our national policy of antitrust law enforcement.

Thus, as a matter of law and as a matter of policy, there is no reason to wed the provisions of section 5(b), which deal with tolling, to the *prima facie* evidence provisions of section 5 (a). The tolling section is patently broader in scope, and encompasses an FTC proceeding even though such a proceeding may not give use to *prima facie* evidence. Therefore, the FTC proceeding against 3M served to toll the statute of limitations, and plaintiff's complaint was timely filed.

B. The FTC proceeding against 3M was a "civil proceeding instituted by the United States" to enforce the antitrust laws within the meaning of section 5(b), and, for that matter, was also a "civil . . . proceeding brought by or on behalf of the United States" under section 5(a).

We turn now to 3M's statutory analysis, which concludes that an FTC proceeding *under the antitrust laws* is neither a "proceeding" nor instituted by "the United States" as those phrases are used in sections 5(a) and 5(b).*

1. An FTC proceeding under the Clayton Act is a "proceeding" within the meaning of sections 5(b) and 5(a).

3M argues that "an FTC proceeding is neither a '*criminal prosecution*' nor a '*suit or proceeding in equity*' " (peti-

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* Respondent discusses section 5(a) here without in any way abandoning its position taken in point I A, *supra*, because of the fact that the judicial and legislative discussion of the language in question relates only to section 5(a).

tioner's brief, page 15 *et seq.*). Neither phrase quoted or argued by the petitioner appears in section 5(a) or 5(b), of the Clayton Act. The language which 3M purports to analyze is contained in the original section 5 of the Clayton Act (38 Stat. 731), which was amended in 1955 to its present language. (69 Stat. 283).

However, even assuming that the "proceeding in equity" language of the original statute is relevant, there is no substance to the argument that an FTC proceeding under the antitrust laws is not analogous to such a proceeding.

a. The 1914 legislative history does not support petitioner's construction.

First of all we must, *per force,* agree with the analysis of *amicus* Highland Supply Corporation in its brief (page 13 *et seq.*) that resort to legislative history is unwarranted and misleading in this case. Any examination of volume 51 of the Congressional Record, which contains the debates on the Clayton and Federal Trade Commission Acts, will quickly involve the reader in a morass of antitrust legislation consisting of amendments to proposed bills in varying forms, some similar to the statute which eventually was enacted, others differing radically. Moreover, whatever legislative history there is, as 3M accurately stated at page 28 of its brief to the Third Circuit, "scarcely discussed" the tolling problem, and there is nothing to suggest that Congress ever actually considered the question whether an FTC proceeding is a "proceeding" within the tolling provision.

Any relevant debate clearly seems to relate to Congress' preoccupation with evidence problems; but even here no comfort can be found for the proposition that Congress did not intend FTC proceedings *under the antitrust laws* to be capable of giving birth to *prima facie* evidence under

the original section 5. This question simply never was discussed in 1914 because FTC determinations were not "final" within the meaning of the first paragraph of the then Section 5, and only "final" determinations gave rise to *prima facie* evidence.

Pending at the same time as the Clayton Act was the Federal Trade Commission Act (38 Stat. 717) whereby the FTC was established. *The Federal Trade Commission Act is not an "antitrust law" as that phrase is used in the statutes of the United States*, since it is not within the definition of "antitrust laws" found in section 1 of the Clayton Act, 38 Stat. 730, 15 U. S. C. section 12. Therefore, any legislative comments with respect to the powers of the Commission or the effect of the Commission's decisions rendered under the Federal Trade Commission Act are irrelevant to this case. FTC proceedings under the Federal Trade Commission Act can never be the basis for a private suit, since they are not brought to enforce an "antitrust law". It is erroneous to disregard this distinction, as petitioner does at page 23 of its brief, and quote the discussion between Messrs. Sutherland and Crawford. Their colloquy came in a debate over the provisions of the Federal Trade Commission Act and did not deal at all with the Clayton Act. Moreover, to further illustrate the lack of relevancy, this particular colloquy is in response to a proposed amendment to the Federal Trade Commission Act which reads as follows:

> "*Provided*, That no order or finding of the court or commission in the enforcement of this section shall be admissible as evidence in any suit, civil or criminal, brought under the antitrust acts."

This provision was not enacted into law.

To demonstrate that (as the *amicus* brief of Reynolds Metal Company amply illustrates)* the legislative history can be all things to all people, petitioner could reach equally as far as 3M in the very same debate and submit Senator Brandegee's comments which support the decision in this matter below:

> "What can be the object sought in preventing an innocent man from having the benefit of the opinion of this Commission, if it may render one, I do not see; neither if the judgment of this Commission or its opinion is worth anything, do I see, if suit is brought by the Attorney General under the Sherman Antitrust Law charging as a violation of that law the same act that was before the Commission charged with being an unfair method of competition, why the Government should not be allowed to introduce the order of the Commission directing the man to stop the practice or the injunction of the court at the request of the Commission, as provided in section 5. 51 Cong. Rec. 12792.

Despite the fact that Judge McLaughlin pointed out in his opinion in the Third Circuit that the debates reproduced at 51 Cong. Rec. 9488 *et seq.* relate to a version of the Clayton Act (H. R. 627, 63rd Cong., 2d Sess.) which did not even provide for FTC enforcement (R. 87; 232 F. 2d 346, 357) the discussion reported at those pages is repeated in part by petitioner's brief (p. 24 *et seq.*) in support of the thesis that only a Justice Department proceeding was contemplated by Congress in 1914. Obviously the speakers at that time could not have been contemplating an FTC

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* At p. 37 of Reynolds' brief is a quotation from Senator Walsh which supports the point that an FTC determination in an adjudicative proceeding comes with section 5(a) *today*, given the change in the nature of the Commission and its proceedings. See p. 34 *infra*.

proceeding when the bill never even provided for it. Such legislative history does nothing but obscure the issues.

In relying on the position of Senator Walsh at page 23 of its brief to demonstrate that only judicial proceedings were contemplated the petitioner points out that Senator Walsh desired to have findings in antitrust proceedings *conclusive* for the purposes of subsequent private litigation. There is significant difference between the considerations which must be weighed when a decree is to be conclusive and when it is to produce only *prima facie* evidence. The Senator's remarks do not apply to the situation at bar.

b. Since 1914, Congress has manifested an intent to endow the FTC with the characteristics of a court of equity.

By a series of legislative enactments, Congress has clearly broadened the powers of the FTC, given more vitality to the effect of its orders, and recognized both directly and indirectly that the FTC today is a body before which substantive rights may be finally determined within the dictates of due process. It is indeed a modern analogue to a court of equity.

Starting with the Wheeler-Lea amendments to the Federal Trade Commission Act in 1938, 52 Stat. 111, 15 U. S. C. sec. 45 which made FTC orders under the Federal Trade Commission Act final without an implementing decree from the Court of Appeals; and continuing with the Celler-Kefauver Antimerger Act, 64 Stat. 1125, 15 U. S. C. sec. 18; and the amendment which resulted in the enactment of sections 5(a) and 5(b) in 1955; through the Finality Act of 1959, 73 Stat. 243, 15 U. S. C. sec. 21(g) Congress has increasingly recognized the expanding scope and stature of the FTC. In *U. S.* v. *The Philadelphia Bank*, 374 U. S. 321, 346 (1963) Mr. Justice Brennan said:

"Congress in 1950 clearly intended to remove all questions concerning the FTC's remedial power over corporate acquisitions, and therefore explicitly enlarged the FTC's jurisdiction."

As the antitrust bar has noted:

"Dramatic prominence has been given to criminal proceedings brought by the antitrust division against a number of our largest corporations, but the activities of the Federal Trade Commission, as a general rule, will have the greatest potential impact upon small business. The jurisdiction of the Commission is exceedingly broad, reaching into virtually every corner of interstate activity. Awareness of the Commission's regulatory functions, more than ever, is essential in 1962, when the commission staff and appropriations—and hence its ability to act—will be the greatest in history." . . .

"As a general rule, the Justice Department has taken a hands-off policy with respect to violations of the Robinson-Patman Act, leaving the administration of that act largely to the Federal Trade Commission." Rockefeller and Wald, "Antitrust enforcement by the Federal Trade Commission and the Department of Justice: A Primer for Small Business", 66 *Dick. L. Rev.* 251, 252, 254 (1962).

As is pointed out in Note, "The Federal Trade Commission and Reform of the Administrative Process", 62 *Col. L. Rev.* 671 (1962) the political climate in Congress has changed from a position of mistrust in the early years to a growing feeling of respect for the functions of the Commission and the procedures adopted by it.

In 1965, if not in 1914, the FTC and similar administrative, quasi-judicial bodies are regarded by the courts as similar to courts of equity. *Cf. Pittsburgh Glass Co.* v. *NLRB,* 113 F. 2nd 698 (8th Cir.) *aff'd* 313 U. S. 146 (1940).

> "Many different types of administrative agencies are given power to issue 'cease and desist' orders, that is orders requiring a desistence from specific practices, and such authority need not necessarily be express. The analogy between such orders and an equitable injunction is recognized." 2 Am. Jur. 2d 279, *Administrative Law,* section 467 (1962).

In discussing the National Labor Relations Board's power to issue cease and desist orders this Court said, "We think that the Board has the same power to determine the needed scope of cease and desist orders from the National Labor Relations Act that courts have, when authorized to issue injunctions, in other litigation." *May Dept. Stores* v. *NLRB,* 326 U. S. 376, 391-2 (1945). In *Jones* v. *S. E. C.,* 298 U. S. 1 (1935), it was held that an S.E.C. proceeding started by an order to show cause why a stop order should not be issued was "analogous to a suit in equity to obtain an injunction." *Cf. Magnolia Petroleum Co.* v. *Hunt,* 320 U. S. 430, 443 (1943); *Pittsburgh Plate Glass Co.* v. *NLRB, supra.* There is no doubt that today an FTC proceeding to enforce the Clayton Act is a civil proceeding analogous to a proceeding in equity, especially when the result of that proceeding can be a final order which has *res judicata* effect as is discussed *infra* at page 42.

c. There is persuasive judicial precedent regarding an FTC proceeding as a "proceeding" under both sections 5(a) and 5(b).

Consistent with what we consider to be the absence of any persuasive legislative history there is positive judicial precedent for the position that an FTC proceeding falls within the purview of both sections 5(a) and 5(b), whether we deal with the present statutory language "civil proceeding" or the 1914 language, "proceeding in equity."

Even under the 1914 wording, Judge Frank of the United States Court of Appeals for the Second Circuit had no difficulty in equating an FTC proceeding with a proceeding in equity. In *Brunswick-Balke-Collender Co.* v. *American Bowling and Billiard Corp.*, 150 F. 2nd 69 (2nd Cir. 1945), he was faced with the problem of the admissibility of an FTC order issued pursuant to a proceeding instituted to enforce the Clayton Act. At the time of the decision, there was a disparity between Section 11 of the Clayton Act, 62 Stat. 991, 15 U. S. C. Sec. 21, the provision authorizing FTC enforcement proceedings, and section 5 of the Federal Trade Commission Act, 62 Stat. 991, 15 U. S. C. section 45, the Federal Trade Commission Act provision setting forth the Commission's authority. Under the latter the Commission's orders were final upon the expiration of a stated period after their issue, while under the former it was necessary to have the order implemented by an enforcing decree from the United States Court of Appeals before it achieved finality.

In the original *Brunswick* opinion, Judge Frank held that an FTC decree under the Clayton Act *was* admissible as *prima facie* evidence. He held that such an order was imbued with the same degree of finality as was an FTC order under the Federal Trade Commission Act by reason of 15 U. S. C. section 45. On re-hearing, the Court held that Sec-

tion 45 was not applicable to FTC proceedings under the Clayton Act, but was limited to the Commission's functions under the Federal Trade Commission Act. Therefore, the FTC order was held *not* to be a final judgment or decree within the purview of section 5(a), and consequently, it was inadmissible in the civil litigation.

In 1959, section 11 of the Clayton Act, 15 U. S. C. sec. 21(g) (73 Stat. 143) was amended to change the ultimate *Brunswick* result by providing automatic finality for an FTC order under the Clayton Act:

> "(g) Any order issued under subsection (b) of this section shall become final—
>
> "(1) upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the commission or board may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b) of this section; . . ."

The avowed purpose of this amendment was to impart to FTC decrees arising out of Clayton Act proceedings the same finality they enjoyed when issued in Federal Trade Commission Act matters:

> PURPOSE OF THE BILL
>
> ". . . The bill as amended would make final cease-and-desist orders issued by the Commissions and Boards with jurisdictions under Sec. 11 of the Clayton Act (. . . the Federal Trade Commission) in the same manner as cease-and-desist orders now become final when issued by the Federal Trade Commission pursuant to the procedures that are set forth in Sec. 5 of the

Federal Trade Commission Act." *U. S. Code Cong. & Admin. News*, 86th Cong., 1st Sess., p. 1804 (1959).[1]

Since Congress has amended the Clayton Act to conform with the Federal Trade Commission Act with respect to finality of FTC orders under Clayton, there no longer is any reason to doubt the propriety of Judge Frank's original decision before re-hearing. The fact that Congress, in 1950, 1955 and 1959, with full knowledge of the *Brunswick* opinion, expanded the jurisdiction of the FTC; eliminated the "equity" language and separated section 5(a) from section 5(b); and remedied the only defect in the Clayton Act which resulted in the reversal of *Brunswick* on re-hearing, is certainly proof of the acquiescense of Congress in the *Brunswick* rationale.

But for the original disparity in the two statutes involved, the *Brunswick* decision is a square holding that an FTC order is admissible as *prima facie* evidence against the defendant in a subsequent civil suit. The opinion cannot honestly be read any other way. If for purpose of the more demanding evidentiary aspects of section 5(a), FTC and Department of Justice proceedings are on a par, then each should be regarded as having been instituted by the United States within the less restricted purview of section 5(b). Any suggestion in the District Court opinion in *Proper* v. *John Bene & Sons, Inc.*, 295 Fed. 279 (E. D. N. Y. 1923) to the contrary must yield to the later and more authoritative *Brunswick* decision. Besides, on its facts, *Proper* is not persuasive or even helpful.

In *Proper*, after first holding that in any event the FTC order there being considered could not be admitted, even *prima facie*, against several defendants in a private ac-

[1] The legislative history further points out that the present language of 15 U. S. C. Sec. 21(g) is taken verbatim from 15 U. S. C. Sec. 45 with only unsubstantial chances. *Id.* at 1807.

tion, when only one had been before the FTC (which is a clearly correct holding, based on hornbook rules of estoppel), the court in *dictum* went on to discuss the then section 5 of the Clayton Act. 3M borrows some of the district court's gratuitous observations, made there in considering the then counterpart of section 5(a), in arguing the meaning of the present section 5(b). Even assuming, again for the sake of argument only, that this is a logical and proper approach to interpreting the tolling section, the argument must fall.

First, and foremost, *Proper* dealt with the effect of an FTC proceeding under the Federal Trade Commission Act.

Secondly, the *Proper* court relied on the fact that (at that time) an FTC order was not "final." This is no longer the law in light of *Brunswick*, *supra*, and the amendment to section 11(g) of the Clayton Act, discussed above. (Note that concern with finality relates only to the *prima facie* evidence provision; nowhere in section 5(b) does the word "final" appear.)

The *Proper* court did *not* hold that an FTC proceeding was not a "proceeding in equity," although in language spotlighted by petitioner here it entertained a "grave doubt" on the point. 295 Fed. 731. This Court must decide, on this issue, only whether an FTC proceeding is a "civil * * * proceeding" within the meaning of section 5(b), which it clearly is.

Finally, to distinguish the *Brunswick* holding petitioner relies on the case of *Wright* v. *Carter Products*, 244 F. 2nd 53 (2nd Cir. 1957) (see petitioner's brief page 33). That case was not a private suit under the antitrust laws but was a suit for personal injuries, so that obviously there would be no estoppel based on section 5(a). Furthermore,

Wright again deals with evidence, not with tolling. Finally it should be pointed out that the FTC's decree *was* admitted into evidence in *Wright* for the limited purpose of proving that there was notice to the defendant of the injury-causing propensity of the product involved. It was admitted for that purpose, even though this was not a private antitrust suit, because of common law rules of evidence. The court had no constitutional difficulty with admitting the FTC finding for this purpose.

For all of these reasons it is clear that an FTC proceeding is a "proceeding" within the meaning of section 5(b) as well as section 5(a).

2. *The FTC proceeding was "instituted by the United States."*

3M's statutory analysis continues with the proposition that "an FTC proceeding is not instituted 'by the United States'." (See petitioner's brief page 18 *et seq.*) This argument is not only startling in its articulation but entirely fallacious in its premises.

For example, to support its argument 3M cites section 2403 of Title 28, U. S. C., 62 Stat. 971 (Petitioner's brief, p. 19), which reads as follows:

> "§2403. Intervention by United States; constitutional question
>
> "In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation

of evidence, if evidence is otherwise admissible in the case, and for argment on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality. June 25, 1948, c. 646, 62 Stat. 971."

Congress apparently is satisfied that when a federal agency is involved in litigation, no notice need be given to the Attorney General because the interests of the United States are adequately protected by the presence of the agency as a party. Is this proof that the agency is *not* the United States?

The statute of limitations of the Federal Tort Claims Act, 28 U. S. C. sec. 2401 (a), 62 Stat. 971, as amended, 63 Stat. 62, illustrates the fallacy in defining an amorphous phrase such as "United States" by reference to other unrelated statutes. For, in that legislation, the phrase "United States" is used to encompass not only the United States but its agencies, employees and other constituent parts. The section merely says "every civil action commenced against the United States . . ." This does not mean that the limitations provisions of the Federal Tort Claims Act are restricted to torts committed by the Justice Department! See *e.g. Reconstruction Finance Corporation* v. *Tuolumen Gold Dredging Corp.*, 137 F. Supp. 855 (D. Cal. 1953). There is obviously no value in looking outside the language of the Clayton Act to determine its meaning.

What is essential for accurate analysis here is a determination of *the function of the particular instrumentality of the Government in the circumstances involved.*

FTC v. *Nash-Finch Co.*, 288 F. 2nd 407 (D. C. Cir. 1961), cited by petitioner (Brief, p. 18) actually illustrates this point. There the FTC argued that the United States should have been joined as an indispensable party to a declaratory judgment proceeding, which had been brought to determine the finality of an FTC order outstanding at the date of the enactment of the Finality Act in 1959. The court said "the interest of the United States in such a case is represented by the agency whose ruling is challenged," page 410, and so no other arm of the Government was an indispensable party.

What is overlooked in each and every instance cited by the petitioner is the fact that there never has been a case in which the Justice Department was permitted to proceed with an antitrust litigation arising out of the same facts on which the FTC had already ruled—*when the FTC was acting pursuant to the antitrust laws.* Since the Federal Trade Commission Act is not an antitrust law, the holding in cases such as *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683 (1948); *U. S.* v. *Charles Pfizer & Co.*, 205 F. Supp. 94 (S. D. N. Y. 1962); *McKesson & Robbins, Inc.* v. *Charles Pfizer & Co.*, 235 F. Supp. 684 (S. D. N. Y. 1964) and *Matter of Columbia Broadcasting System, Inc.*, 235 F. Supp. 743 (E. D. Pa. 1964) are completely inapposite. In each of those cases the FTC was acting under the Federal Trade Commission Act. As such its jurisdiction was not identical with that of the Justice Department.

In three briefs in this matter, 3M has failed to cite one case in which the Justice Department was not bound by an FTC determination or in which the FTC was not bound by a Justice Department determination when both were proceeding on the same facts against the same parties *under the antitrust laws.* Actually, where two federal instrumentalities have concurrent and overlapping jurisdiction,

there is an estoppel between them. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 403 (1939); *Cromwell* v. *County of Sac*, 94 U. S. 351 (1877); *U. S. v. Willard Tablet Co.*, 141 F. 2nd 141 (7th Cir. 1944); *Hobby* v. *Hodges*, 215 F. 2nd 754 (10th Cir. 1954); *U. S.* v. *Five Cases, each containing one demijohn, 5 gallon size, of Capon Springs Water*, 156 F. 2nd 493 (2nd Cir. 1946); *U. S.* v. *One Dozen Bottles, each containing an article labeled in part Bouquet Tablets*, 146 F. 2nd 361 (4th Cir. 1944); *Lee* v. *FTC*, 113 F. 2nd 584 (8th Cir. 1940); *U. S.* v. *Hindman*, 179 F. Supp. 926 (D. N. J. 1960).

One clear effect of Judge Frank's opinion in *Brunswick* was to equate an FTC proceeding under the Clayton Act with a proceeding instituted by the Justice Department. *Cf. United States v. United Shoe Machinery Corporation*, 89 F. Supp. 349, 356 (D. Mass. 1950). This aspect of the *Brunswick* case is eminently correct. Otherwise, plaintiff's rights would turn on "the fortuitous circumstances of whether it is the Department of Justice or the Federal Trade Commission which institutes the proceedings." *Burns, A Study of the Antitrust Laws*, 529 (1958). The FTC and the Justice Department have concurrent and overlapping jurisdiction to enforce the Clayton Act. See Clayton Act, Sec. 11, 73 Stat. 243, 15 U. S. C. A. Sec. 21. Were there any rational method set forth by Congress or the agencies themselves to determine which shall prosecute a given violation, there might be some sense in attaching substantive legal significance to the character of the prosecutor. In fact, the selection of cases to prosecute is not coordinated or effected pursuant to any articulated criterion. *Burns, supra*, p. 528 *et seq.* In the *Atty' Gen. Nat'l. Comm. Antitrust Rep.* 374 *et seq.* (1955), it is stated that no boundaries have been set limiting the respective jurisdictions of the two enforcement agencies.

Assistant Attorney General Barnes testified in hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, 84th Congress 2nd Session, on June 7, 1955.

Chairman Kilgore asked:

"Do you not think it would be better if we spelled out the jurisdiction and responsibility and authority so that each [the Antitrust Division of the Justice Department and Federal Trade Commission] realized what his exclusive responsibility was and what his exclusive authority was?

"Mr. Barnes: Well I do not think I am qualified to answer the question.

"I have only seen it in operation where both have exclusive jurisdiction along certain lines. I think it has worked out quite well. It is always possible to overlook some field where action should be taken. But I also point out to you that when there is concurrent jurisdiction that it is a two-edged sword. It puts you on your toes.

"There is quite a little rivalry in certain areas between the Federal Trade Commission and the Antitrust Division to show that they are on the ball and watching developments, and under this system that we have, why, *the first one that takes the bit in his teeth is the one who has the priority* unless there is some reason to change that general rule because of the peculiar facts of the case . . ." (emphasis supplied)

"The Chairman: Your system [of allocation of prosecution between the Antitrust Division and the Federal Trade Commission], then depends upon personalities?

"Mr. Barnes: That is right.

"The Chairman: I think a law should not depend upon or be dependent upon personalities. I think a law must plainly say what it intends to say so that there is no question of personal agreement involved . . .

"Mr. Barnes: . . . but in responsibility it should be direct as to whether there should be two responsibilities rather than one, and that is a matter of congressional policy.

"The Chairman: That is right."

As noted by Judge Augelli (R. 64a) there is no justice in permitting a plaintiff's rights to be determined by such an *ad hoc* allocation of prosecutions to two agencies charged identically with enforcing the Clayton Act. Such a result might well render section 5(b) unconstitutional.

It is submitted that it would be a violation of the rights of private litigants as protected by the Fifth Amendment of the United States Constitution if the tolling provision was held inapplicable to them when happenstance placed an investigation and prosecution in the hands of the FTC rather than under control of the Antitrust Division of the Justice Department. *Butler, op. cit.*, page 46-52. There is no rational basis for the discrimination:

> "The nearest approach to a definite rule is that, while the difference need not be great, the classification must not be arbitrary or capricious, but must bear some just and reasonable relation to the object of the legislation." *Bayside Fish Flour Co.* v. *Gentry*, 297 U. S. 422, 427 (1935). See *Joseph F. Finch & Co.* v. *Kittrick*, 23 F. Supp. 244 (W. D. Mo. 1938) *aff'd* 305 U. S. 395.

Although the equal protection provision of the Fourteenth Amendment does not apply *in haec verba* to the Federal

Government, the concept of equal protection has been held to be an integral part of due process. *Cf. Bolling* v. *Sharpe*, 349 U. S. 294 (1954).

All of the weight of our constitutional history is directed against having the rights of citizens turn on "fortuitous circumstances" or "personalities". A holding affirming the opinions below will continue the thrust of that history.

3. *There is no constitutional barrier to holding that an FTC decree comes within Section 5(a).*

There remains for consideration the protestation that any construction bringing an FTC proceeding within the scope of section 5(a) violates the Fifth Amendment (Petitioner's brief, p. 48 *et seq.*). This motion is based on a Star Chamber view of an FTC hearing.

Respondent concedes that the rules of evidence before the Federal Trade Commission are broader than those before a court sitting with a jury. This does *not* mean that by regarding such proof the FTC thereby violates the constitutional rights of the parties who appear before it. Yet the decisions of the FTC certainly affect the substantive rights of those parties as finally as do judicial determinations. Similarly there are myriad fallacies in the notion that due process would in any way be violated were an FTC proceeding to generate *prima facie* evidence in a subsequent private suit.

Petitioner's theory totally disregards the epistemic foundations on which the rules for the admissibility of evidence are based. As Kenneth Culp Davis so precisely states:

"§14.01. The Trend of the Case Law

"The direction of movement on evidence problems throughout the legal system, in the judicial process as

well as in the administrative process, is toward (1) replacing rules with discretion, (2) admitting all evidence that seems to the presiding officer relevant and useful, and (3) relying upon 'the kind of evidence on which responsible persons are accustomed to rely in serious affairs.'"

"Whether the trier of fact is a jury, a judge, or an administrator, the trend is away from the rigidity of the exclusionary rules, although the extent of the departures from the exclusionary rules is clearly much greater in cases tried before judges or administrators than in cases tried before juries, and is probably greater in cases tried before administrators than in cases tried before judges. Within each of the three categories, of course, the variations in practice are rather considerable, especially in judge-tried cases. In many cases before judges or administrators, the only direct effect of the exclusionary rules is the occasional application of a rule of privilege. The guides are not the complexities of the jury-trial rules but are the broad standards of relevance, materiality, and the kind of evidence on which responsible persons are accustomed to rely in serious affairs.

"In cases tried before judges or administrators, the focus is less and less upon the somewhat artificial question of what evidence should be admitted or excluded and more and more upon the highly practical question of what weight should be given to particular evidence. (Footnote omitted). 2 Davis, *Administrative Law Treatise*, 250-251 (1958).

The courts have increasingly recognized that the legal process is a continuous search for truth and not a contest in technicalities, *ibid* §1401.

As Judge Wyzansky noted in *United States v. United Shoe Machinery Corporation*, 89 F. Supp. 349, 356 (D. Mass. 1950):

> "It is difficult to imagine any satisfactory ground for deciding that evidence which is admissible before the FTC is inadmissibile before a judge sitting without a jury in a civil antitrust suit brought by the government. There is no difference between the substance of antitrust law applied by the Commission and that applied by the court. In a *civil* antitrust case the Government has the unfettered choice of going before a Commission or before a court without a jury."

3M finds "substantive differences in the quality of judicial and administrative determinations of fact . . ." (Petitioner's Brief, page 48). This conclusion totally ignores the difference in expertise between agency and jury. Respondent submits that nothing produced by the petitioner with reference to the nature of the proof taken by the Federal Trade Commission in any way derogates from the trustworthiness of the evidence or the validity of the conclusions reached by the FTC.

A recent opinion by the New York Court of Appeals is in point. *Fleury v. Edwards*, 13 N. Y. 2d 334, 200 N. E. 550, 251 N. Y. S. 2d 647 (1946). In that case plaintiff's intestate had been involved in an automobile accident which resulted in his being injured. After testifying in a hearing by the State Motor Vehicle Bureau to determine whether any licenses should be revoked as a result of the accident, the intestate died. The procedure before the bureau had allowed the taking of testimony and cross-examination, the same opportunities which are afforded to a respondent in an FTC proceeding. See page 39 *infra*. Although the defendant in the subsequent negligence action argued that

the record of the testimony of the decedent should be inadmissible, the court held that it should be admitted because:

> "Everything seems to favor a holding that such former testimony of a now deceased witness should be taken when it was given under oath, referred to the same subject matter, and was heard in a tribunal where the other side was represented and allowed to cross-examine." Page 552, 553.

The court found no difficulty in admitting the testimony from the prior administrative proceeding because the party against whom the testimony was offered had the opportunity to cross-examine and had the same motive in the prior proceeding to expose falsehood and inadequacy of proof. Clearly this is the case where there has been a litigated proceeding before the Federal Trade Commission and it is only where the proceeding is litigated that the *prima facie* evidence provision applies.

As Chief Judge Desmond wrote:

> "The objective of all rules of evidence is to prevent further injustice by putting before the fact trier for testing, and acceptance or rejection such oral and documentary proofs as carry a high probability of trustworthiness . . . ."

In Judge Fuld's concurring opinion he said:

> "Whether prior testimony before an administrative body would have been admissible in 1879, when the predecessor of CPLR 4517 was adopted, is not significant. The common law of evidence is constantly being refashioned by the courts of this and other jurisdictions to meet the demands of modern litigations. Exceptions to the hearsay rules are being broadened

> and created when necessary. (Citations omitted) Absent some strong public policy or a clear act of preemption by the legislature, rules of evidence should be fashioned to further, not frustrate, the truth finding function of the courts in civil cases."

There are two primary reasons for exclusionary rules of evidence in a jury trial. The first stems from the nature of the jury. Comprised of a group of laymen, the jury is not competent to evaluate proof outside of the ken of the ordinary citizen:

> "A second thing to remember is that the jury-trial rules are intended for a constantly changing tribunal of fact composed of inexperienced jurymen dealing with hundreds of types of cases. When the tribunal is composed of *experienced professional men*, habitually inquiring day after day into the *same limited class of facts* (as happens with most administrative boards), an expert weighing of evidence can generally be counted on. The portions represented by the exclusionary jury rules can and will be applied by such a tribunal in weighing the evidence, without actual exclusion of it." 1 Wigmore, *Evidence*, 36 (3d ed. 1940).

There is no doubt that by reason of its expertise the Federal Trade Commission can accept and evaluate evidence not admissible at a jury trial without thereby arriving at a result which is not based on the truth. The basic trustworthiness of the FTC finding is as great as that returned by a jury of laymen.

But 3M argues that because *money damages* are involved in a private suit the defendant is entitled to all of the evidentiary safeguards of a jury trial (petitioner's brief, p. 51 *et seq.*). Accepting this hypothesis, the question thus becomes whether the admissibility of a FTC finding as *prima facie* evidence would violate those safeguards.

There can be no doubt from the foregoing that an FTC decree is trustworthy. The only other objection to its admissibility appears to be that it is hearsay. Wigmore accurately analyzes the basis for the hearsay rule as the right to cross-examine. 5 Wigmore, *Evidence*, 3 (3rd ed. 1940).

A respondent in an FTC proceeding has complete opportunity to present its case including full right of cross-examination, by reason of the rules of the FTC itself:

> "Every party, except intervenors, shall have the right of due notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing." 16 C.F.R. 3.15 (b)

In addition, parties appearing before the FTC have the right of depositions prior to hearing, 16 C.F.R. 3.11; the right to use requests for admissions as to facts and documents, 16 C.F.R. 3.12; and can, under appropriate circumstances, obtain subpoena power, 16 C.F.R. 3.17.

Finally, it should never be overlooked that the government determination is *not* conclusive. *The decree is only prima facie evidence.* Defendant still has complete right of rebuttal, even though by definition the right to litigate the issue fully has been afforded the defendant once before—at a time when the defendant also could have introduced evidence *in its behalf* which might not be competent in a jury trial.

The fact is that in permitting the FTC decree to be prima facie evidence there is no constitutional issue raised at all. This cannot be more graphically demonstrated than by the legislation which the FTC expressly requests in its Annual Report for 1964:

> "4. Amend section 5(a) of the Clayton Act (15 U. S. C. 16(a)) so as to include a final order of the Federal Trade Commission; that is, amend section 5(a) to read:

> A final judgment, decree or final order to cease and desist of the Federal Trade Commission heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 4A, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 4A." p. 34.

It should not be assumed that the proposed legislation indicates that the FTC thinks that its decrees are not now *prima facie* evidence under section 5(a). Given the confusion in the law created by the divergent opinions in this case and *Highland Supply Corp.* v. *Reynolds Metal Co.*, 237 F. 2d 725 (8th Cir. 1964) there is no wonder that the Commission has asked Congress to give a definitive answer.

The proposal does indicate clearly, however, that the FTC has no constitutional difficulties with the notion that its decrees in *litigated proceedings* shall become *prima facie* evidence. Judge McLaughlin agreed:

> "It is also clear that the status of the *Brunswick-Balke* opinion of Judge Frank was fundamentally misunderstood.* The sound legal principles there pronounced

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* Judge McLaughlin is referring here to the decisions in *Highland Supply, supra; Volasco Products Co.* v. *Lloyd A. Fry Roofing Company*, 223 F. Supp. 712 (E.D. Tenn. 1963) and *Farmington Dowel Products Co.* v. *Forster Mfg. Co.*, 223 F. Supp. 967 (D. Me. 1963).

that final FTC orders in Clayton Act proceedings are admissible within Section 5(a), was not reversed. It was simply not usable because, as was discovered, there was no Finality Act at the time, dealing with FTC-Clayton Act orders. When Congress passed the Finality Act in 1959, it simply vitalized the principle of *Brunswick-Balke* as to section 5(a). We are satisfied that this principle is good law and good common sense and that its logical extension is applicable to the Section 5(b) question here involved." 232 F. 2d at p. 360.

4. There is no policy barrier to holding an FTC proceeding within sections 5(a) and 5(b).

Marching alongside the constitutional bugbear envisioned by petitioner is a parade of horrors (called "anomalies") which the opinion below allegedly has created (see petitioner's brief, p. 67 *et seq.*).

The first such "anomaly" is that an FTC proceeding under the Federal Trade Commission Act cannot generate *prima facie* evidence,[1] while an FTC proceeding under the Clayton Act can, under the holding below. This is nothing more than the result of the conscious policy of Congress in defining "antitrust laws" under the Clayton Act to exclude the Federal Trade Commission Act. Congress did not give private plaintiffs the right to base a cause of action on a violation of the Federal Trade Commission Act, so that there is no reason to consider it anamolous that a decree issued in a proceeding under that statute cannot be evidence in a subsequent civil suit.

To point up the absence of any anomaly, a prosecution by the FTC for violation of the Federal Trade Commission

[1] Note that this discussion at page 68 of petitioner's brief talks about *prima facie* evidence and not tolling.

Act does not bar a subsequent prosecution by the Justice Department under the Sherman or Clayton Acts arising out of the same facts. *U. S.* v. *Charles Pfizer & Co., Inc., supra; McKesson & Robbins, Inc.* v. *Charles Pfizer & Co., Inc., supra; Matter of Columbia Broadcasting System, Inc., supra.*

Flowing from this first anomaly 3M predicts "a flood of litigation" (petitioner's brief p. 88). Where has it been? The statute of limitations is a four year statute. Clayton Act section 4b, as amended 69 Stat. 283, 15 U. S. C. 15b. The tolling provision tolls the statute of limitations for only one year after the pendency of the government proceeding. Section 5(b). Were petitioner correct, there would presently be pending in the federal courts "a flood of litigation" since Judge Augelli's opinion in the District Court in this matter was rendered on April 22, 1963. Any private litigant who was seeking to take advantage of an FTC proceeding terminated in the interim would have been required to institute his action within one year after such termination. Yet we have neither read nor been advised of any deluge of private antitrust suits since then.

Repeated at page 69 of petitioner's brief is the argument that there would be an estoppel against the Justice Department if paragraph 5(a) is held applicable to FTC proceedings under the antitrust laws. 3M is right. That *is* the law which petitioner hitherto has chosen to ignore. See page 30 *supra*.

At page 70 of its brief petitioner states:

> "If the statute of limitations is now to be tolled during the pendency of government 'investigations'—regardless of the outcome thereof—and if private plaintiffs are to be supplied with evidence from government investigations, private plaintiffs can be expected to await the results of government investigation, and the use-

fulness of private actions as an independent means of enforcement of the act will thus be diminished. Of course, it is also true that such a rule would forfeit a major present inducement to respondents in Commission proceedings to accept consent decrees."

This reasoning does not hold up under analysis. It was intended that private plaintiffs should await the results of government proceedings. See page 15, *supra*. The private action still will remain as a significant enforcement device under the antitrust laws because the threat of private action will deter violations.

With regard to the likelihood of consent decrees being inhibited (petitioner's brief, p. 70), it is well to point out that there are no *prima facie* evidence benefits to be gained by the private litigant when a consent decree is entered. Therefore, the impetus to consent will still be there, in order to avoid the evidentiary effect of the decree.

While it is true that the sanctions which a defendant faces when the Justice Department elects to proceed criminally under the Clayton Act are far more drastic than those which the Commission may impose under that Act (petitioner's brief, p. 70) this is not anomalous or even surprising. The Justice Department is equipped to maintain criminal prosecutions by its very structure and function in our executive system. The FTC is not. Happily, there is no overlapping of jurisdiction here; the function of each agency is clearly defined and no fortuitous circumstance affects the rights of individuals.

In this conjunction it is interesting to note that criminal prosecutions to enforce final FTC orders issued under either the Clayton Act or the Federal Trade Commission Act are brought by the Justice Department. Clayton Act, sec. 11, as amended, 15 U. S. C. section 21(l); Federal

Trade Commission Act, section 5, as amended, 15 U. S. C. 45(l). *Cf. U. S.* v. *St. Regis Paper Co.*, —— F. Supp. —— (S. D. N. Y. Feb. 9, 1965); C. C. H. Trade Reg. Rep. ¶71,379. The issue in such prosecutions is not whether the FTC determination was accurate. The Justice Department merely must show a violation of the decree. *Ibid.* Upon proof of such violation heavy monetary penalties may be levied against the respondent. What then remains of 3M's argument that the FTC proceeding is not sufficiently safeguarded in constitutional terms to render a judgment which may have a monetary effect? (see petitioner's brief, p. 51 *et seq.*). This, after all, is the heart of 3M's argument that an FTC proceeding should not result in *prima facie* evidence. Yet the decree is *conclusive* in a proceeding for cash penalties based on its violation.

The final anomaly seen by 3M stems from the fact that the FTC cannot sue for single damages under section 4a (petitioner's brief, p. 70). This is the result of the procedural requirements of a suit for single damages to which the Justice Department is uniquely adapted. But where Congress has decided that the Justice Department and the FTC are equally as well suited to handle a particular function—as is the case with the antitrust laws—no anomaly appears unless we permit a private litigant's rights to be determined by whether the FTC or the Justice Department undertakes a particular antitrust prosecution.

POINT II

Plaintiff's causes of action based upon violations of sections 1 and 2 of the Sherman Act were also suspended by virtue of the Federal Trade Commission proceeding against the defendant 3M.

Although the Federal Trade Commission proceeding against defendant 3M was based on the Commission's power to enforce the Clayton Act, the facts giving rise to the proceeding were substantially identical to those which give rise to plaintiff's Sherman Act cause of action. Namely, the FTC was concerned with potential violation of the antitrust laws caused by 3M's acquisition of I.W.I. in that "the effect of such acquisition (might have been) substantially to lessen competition, or *to tend to create a monopoly.*" (Emphasis supplied.) Clayton Act, Sec. 7, 38 Stat. 731, 15 U. S. C. Sec. 18.

The wording of the statute, Sec. 5(b) unambiguously supports the holding that plaintiff's causes of action under both the Sherman and Clayton Act were preserved. Thus, Sec. 5(b) speaks of a civil proceeding to enforce "*any* of the antitrust *laws,*" in which event the statute of limitations is tolled "in respect of *every* private right of action arising under said *laws* and based . . . on *any* matter complained of in said proceeding . . ." (Emphasis supplied). Plaintiff's Sherman Act complaints here are based on the identical factual matters complained of in the FTC proceeding.

In *Union Carbide and Carbon Corporation* v. *Nisley,* 300 F. 2d 561 (10th Cir. 1962), Chief Judge Murrah was faced with a similar issue. There the question was whether the Clayton Act statute of limitations (which applies to Sherman Act violations, too) was tolled by certain government

proceedings against the defendants. The government had alleged certain conspiratorial acts in violation of the Sherman Act. The defendants in *Nisley* tried to avoid tolling of the statute of limitations by applying the rules of estoppel. That is, they said that there could be no tolling unless the identical facts were raised in the government proceeding and in the subsequent private suit.

This proposition was categorically rejected by the Court:

> "If we accept the appellants' [defendants'] interpretation of Section 5(b), a Section 4 plaintiff would be put to the necessity of bringing suit on the same conspiracy alleged in the government suit, or suffer the bar of the statute as to every overt act not complained of in the government suit. This interpretation would lead to a multiplicity of suits with duplication of proof. It would add to the burdens of the private suitor to the harassment of the defendants. We do not think Congress intended any such result. Rather, we think Section 5(b), as amended, was intended to suspend the running of the statute on a Section 4 claim during the pendency of a government-instituted suit which complained of all, or a part of the means relied upon by the private plaintiff to effectuate the same general combination and conspiracy.
>
> "These private suits alleged substantially the same conspiracy against the same defendants as in the government suit. They relied upon the same documentary and oral proof to establish the conspiracy, and they also relied 'in part' on the same means for the effectuation of the same conspiracy. There was substantial identity of subject matter, and this was sufficient to suspend the running of the statute."

While *Nisley* is distinguishable from the case at bar, because the government proceeding and the private suit there both were based only on the Sherman Act, this distinction is not material. The intention of Congress in providing a tolling section was to permit private litigants to wait until the government proceeding terminates before filing suit. This Court has recognized that Section 7 of the Clayton Act and Sections 1 and 2 of the Sherman Act are closely interrelated:

> "It must be assumed, however, that the public policy announced by Section 7 of the Clayton Act is to be taken into consideration in determining whether acquisition of assets of Consolidated by United States Steel with the same economic results as the purchase of the stock violates the prohibitions of the Sherman Act against unreasonable restraints." *U. S.* v. *Columbia Steel Co.*, 334 U. S. 495, 507 (1947).

The two antitrust statutes are interlocking and overlapping parts of the same statutory scheme, and, as in the instant litigation, the same acts can be violative of both. There is no reason why a private litigant should be forced to institute suit under the Sherman Act *so long as the government proceeding*, even though under the Clayton Act, *deals with subject matter which violates both statutes. Nisley, supra*, p. 570. This "would add to the burdens of the private suitor to the harassments of the defendants." *Id.*

Plaintiff submits that to force a private litigant to institute suit under the Sherman Act just because the government decides to proceed only under the Clayton Act would be to frustrate the intention of Congress in enacting the tolling section, so long as the facts in the Clayton Act proceeding are substantially identical with and give rise in

substantial part to the private suitor's Sherman Act cause of action. This is the rationale of the *Nisley* opinion, which is equally apposite here.

Time and again courts have recognized that the label given to the antitrust laws is not important. What is significant is the fact that there are antitrust policies in the United States which must be supported and that the statutes supporting those policies inter-relate. To become over technical would frustrate this purpose. The Court of Appeals for the 8th Circuit dealt with the nature of the statute of limitations under the Clayton Act and its relationship to the entire antitrust law scheme in a recent opinion.

> "While lack of uniformity in the stautes of limitations was undeniably a prime factor which motivated Congress to enact § 4B, our careful consideration of all phases of the instant controversy drives us irresistibly to the conclusion that Congress was equally concerned with *efficient enforcement of the Clayton Act which certainly cannot be accomplished if the statute is given a literal construction.* We are not persuaded to believe that Congress meant to proscribe and outlaw conspiracies and combinations in restraint of trade, only to reverse itself by enacting a statute of limitations that would reward successful conspirators. When the antitrust laws are violated, the wrongdoers who are successful in cloaking their unlawful activities with secrecy through cunning, deceptive and clandestine practices should not, when their machinations are discovered, be permitted to use the shield of the statute of limitations to bar redress by those whom they have victimized. (Emphasis supplied.) *Kansas City, Missouri* v. *Federal Pacific Electric Co.*, 310 F. 2d 271 (8th Cir. 1962).

Citing cases such as *Momand* v. *Universal Film Exchange, supra,* and *Steiner* v. *20th Century Fox Film Corp., supra,* does not advance the argument of petitioner, since those cases involve parties other than those who appeared before the Government agency. Nor is it true that "matters complained of" are, as petitioner states "necessarily and essentially-different where the theory of antitrust liability differs" (petitioner's brief, p. 73).

Looking at the FTC complaint at page 25a *et seq.* it is clear that the allegations in paragraphs 1, 2, 3 and 4 are allegations which could sustain a Sherman Act cause of action as well as one brought under the Clayton Act. See *Utah Gas Pipelines Corp* v. *El Paso Natural Gas Co.,* 233 F. Supp. 955, 962 (1964). The language of the complaint is as follows:

> "1. Minnesota Mining, as the largest producer of electrical insulation tape, and with its acquisitions of leading manufacturers of other electrical insulation products, by acquiring two of the three largest distributors of electrical insulation products in the United States, *has extended and integrated its business in such manner as to substantially increase its position in the manufacture, sale and distribution of electrical insulation products;* and it may exercise the inherent powers of its acquired position to substanitially lessen competion or tend to create a monopoly in the manufacture, sale and distribution of electrical insulation products.
>
> "2. Manufacturers of electrical insulation products *have been foreclosed from a substantial share of the markets for said products.*
>
> "3. *Competition has been eliminated* between Prehler and IWI in the distribution and sale of electrical

insulation products in the sections of the country in which they are competing, and potential competition has been eliminated between said companies through the United States.

"4. Actual and potential *competition has been* eliminated between Minnesota Mining and the two acquired distributors. (Emphasis supplied)

Even a cursory examination of the problems involved indicates how a private plaintiff would be injured if the name of the antitrust law, rather than (as the statute commands) the fact that the defendant was involved in an antitrust proceeding "based in whole or in part on any matter complained of in" a subsequent civil suit, should determine whether the private litigant can await the outcome of the government proceeding. There is no justice to anyone in such a rule of law.

The "matters complained of" by the FTC in Docket 7973 are the same as those which form the basis for respondent's Sherman Act and Clayton Act causes of action. The Third Court so found:

"We, therefore hold that the acquisition of IWI was a 'matter complained of' within Section 5(b) and that the statute of limitations was tolled as to the Sherman as well as the Clayton counts."

CONCLUSION

Wherefore, respondent respectfully prays that the decision below be affirmed in all respects.

Respectfully submitted,

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